Verizon Communications
1300 I Street NW, Suite 400W
Washington, DC 20005

February 19, 2002

**Ex Parte**

William Caton
Acting Secretary
Federal Communications Commission
445 12th H Street, SW, Portals
Washington, DC 20554

*RE: Application by Verizon-New Jersey Inc. for Authorization To Provide In-Region, InterLATA Services in State of New Jersey, Docket No. 01-347*

Dear Mr. Caton:

On Friday, February 15, 2002, C. Nogay, J. Pachulski, K. McLean, C. Odom, D. May, A. Berkowitz and L. Owsley of Verizon met with G. Cohen, A. Johns, B. Olson, J. Miller, J. Carlisle, R. Lerner, S. Bergmann and R. Tanner of the CCB to discuss issues relating to Verizon's *force majeure* policy and VZ-NJ's OSS. This letter memorializes and expands upon our discussion on the *force majeure* policy. Additionally, this letter provides answers to questions regarding Verizon's application for long distance authority in New Jersey, including dark fiber, switching features and the Access New Jersey program.

Force majeure. XO had argued (at 22-23) that the Commission should not grant Verizon's application while Verizon is operating under a force majeure declaration, claiming (without any support or explanation) that the declaration means that "Verizon can simply refuse to honor commitments to CLECs." XO also claimed (again without support or explanation) that, because of the declaration, "Verizon is not reporting its compliance with applicable performance standards in New Jersey." *Id.* Both claims are misplaced. *See* Verizon Reply Comments at 55 n.52; Lacouture/Ruesterholz Reply Decl. ¶¶ 97-98.

First, the September 19, 2001 letter cited by XO simply provided notice to CLECs operating in the states most immediately affected by the events of September 11 that, to the extent notice was required under Verizon's "interconnection agreements or tariffs," Verizon considers the events of September 11 to qualify as a force majeure event. *See* Attachment 1 (September 19, 2001 letter from Jeff Masoner). Verizon's interconnection agreement with XO, for example, has a force majeure provision that defines force majeure to include "acts of a public enemy," "fires" and "explosions." *See* Interconnection Agreement between Verizon and XO Communications, Section 19.1 (App. H, Tab 9) (relevant excerpt attached as Attachment 2). The events of September 11, 2001, meet this definition, and Verizon's interconnection agreement requires that Verizon provide prompt notice of the occurrence of force majeure events to XO. *See*

Interconnection Agreement between Verizon and XO Communications, Section 19.2 (App. H, Tab 9). As mentioned above, the September 19 letter provided this notice.[1]

Second, contrary to XO's claims, the September 19 notice is not a unilateral declaration that Verizon can ignore its obligations under its interconnection agreements. On the contrary, the interconnection agreement with XO expressly spells out precisely what effect the occurrence of a force majeure event has under the agreement. Specifically, it makes clear that "neither Party shall be liable" under the agreement for a delay or performance failure if it is "caused by" the force majeure event. *See* Interconnection Agreement between Verizon and XO Communications, Section 19.1 (App. H, Tab 9). Furthermore, if Verizon's performance is delayed by a force majeure event, Verizon is still subject to any applicable nondiscrimination obligations. For example, the XO agreement provides that "[i]n the event of such delay, the delaying Party shall perform its obligations at a performance level no less than that which it uses for its own operations." *See* Interconnection Agreement between Verizon and XO Communications, Section 19.1 (App. H, Tab 9). Consequently, under the terms of its interconnection agreements, the fact that Verizon has provided notice that it considers the events of September 11 to qualify as a force majeure event means simply that Verizon could raise the force majeure event as an affirmative defense if a CLEC were to initiate a breach of contract action against Verizon to the extent that any alleged delay or failure in performance were directly "caused" by the force majeure events. No such claims have been asserted in New Jersey and consequently Verizon has not invoked the occurrence of the force majeure event as a defense to any such claims. During the state hearings on Verizon's Section 271 application, XO was not able to identify a single instance or customer affected by its supposed concerns respecting Verizon's notice of a force majeure event.

Third, with one limited exception, Verizon has continued to report its performance under the Carrier-to-Carrier Performance Reports as if the events of September 11 never occurred and Verizon has demonstrated that its performance fully meets the checklist requirements. As the Commission obviously knows from evaluating the performance results, Verizon has provided performance data from before, including and after September 11 as part of its application, and that data shows that Verizon's checklist performance is excellent and nondiscriminatory. Verizon has not sought to adjust or excuse its performance based on the events of September 11. The only exception was in the month of September, where Verizon excluded 3 CLEC dedicated final trunk groups and 4 Verizon common final trunk groups under NP-1-01-5000 that blocked over threshold as a direct result of the events of September 11. However, Verizon did not seek to excuse its performance on this measurement. Instead, because of the loss of equipment belonging to both Verizon and the CLEC community, Verizon could not determine the appropriate classification of the blockage – to either Verizon or the CLECs – under the business rules for this measurement. Accordingly, Verizon excluded data from this small number of

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[1] Verizon's employees are continuing to perform restoration activities in lower Manhattan and certain employees are continuing to work from temporary locations. These activities could have unforeseen effects on Verizon's contract performance in New Jersey. For these reasons, Verizon has not given notice that the force majeure event with respect to its interconnection agreements has ended and does not yet know when it will be able to give such notice.

trunks in September only because of its inability to classify them appropriately. And Verizon explained this fact in the letter submitting its September performance results to the New Jersey Board, which was included in its application here. Guerard/Canny/DeVito Decl., Att. 1 at 23.

Fourth, while even XO does not claim otherwise, it is worth noting that the events of September 11 have had no effect on the operation of the New Jersey Performance Incentive Plan, nor does the September 19 letter relate in any way to the Performance Incentive Plan. On the contrary, while Verizon received a suspension of the corresponding performance assurance plan in the state of New York, it neither requested nor received such a suspension in New Jersey.[2] As a result, the New Jersey Plan has remained in effect and Verizon's performance continues to be subject to the terms of the New Jersey Plan. In order to obtain relief for any performance requirements or penalties under the New Jersey Plan, therefore, Verizon would have to follow the separate procedures laid out in the New Jersey Plan for addressing force majeure events. Under those procedures, Verizon is required to submit notice to the New Jersey Board and the CLECs within five (5) business days of the event and, if it believes it should be excused from paying any amounts otherwise due under the Plan, it must pay those amounts into escrow. App. J, Tab 2 at 168. Verizon has not taken either of these steps and its checklist performance in New Jersey continues to be subject to the terms of the New Jersey Plan.

Finally, AT&T claims (at 28) that the New Jersey Plan contains an overbroad force majeure clause that places the burden on CLECs to challenge Verizon's invocation of the provision. As an initial matter, the force majeure and waiver provisions of the New Jersey Plan are not significantly different from the comparable provisions of the New York and Pennsylvania Plans. Under the New York and Pennsylvania Plans, as under the New Jersey Plan, Verizon may seek a waiver or an exception from payment, which will be filed before making payment to the CLECs. The same criteria – clustering of data, CLEC action, and events beyond Verizon's control – provide the bases on which Verizon may seek to withhold payment in New Jersey, New York, and Pennsylvania. Moreover, in New Jersey, CLECs have 30 days from the time Verizon submits its monthly performance report containing the affected data in which to respond to Verizon's request for a waiver or an exception from payment. This is significantly longer than in either New York or Pennsylvania; in New York, CLECs have 10 days from the time of Verizon's filing of a request, and, in Pennsylvania, CLECs have 30 days after being informed of Verizon's decision to invoke the exceptions process (this notification must occur long before the monthly performance report is submitted). Under both the New Jersey and the Pennsylvania Plans, a CLEC's objection is sufficient for the state commission to institute a proceeding to review Verizon's claim. However, in all three states, Verizon remains obligated to demonstrate that it is entitled to withhold payment under the plans. App. J, Tab 2 at 168.

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[2] New York is the only state in which Verizon reports its performance where the commission suspended the operation of the performance assurance plan as a result of the events of September 11. The New York PSC lifted that suspension effective December 1, 2001 and the New York performance assurance plan is now fully in effect. Verizon has neither requested nor received relief from any performance assurance plan in any other jurisdiction for the events of September 11.

Switching features. ATX argued (15-20) that Verizon did not make available certain switch features and services in connection with network element platforms. As explained further below, Verizon responded to each of ATX's requests by undertaking the product development activity and making the necessary changes to Verizon's ordering, provisioning and billing systems to make each of these features and services available by the end of last year. *See* Verizon Reply at 18-19.

Verizon's implementation of each of these products was fully consistent with a product development and rollout schedule that is normally 8 to 12 months or more. App. B, Tab 7 at 708 (November 8, 2001 Hearing Transcript at 708); *see also* McLean/Wierzbicki/Webster Decl., Att. 19. Verizon uses a standard software development life cycle for new product offerings to ensure that software requirements are properly analyzed, designed, developed, tested, and implemented. The major phases of the life cycle include (1) Requirements Analysis; (2) Design; (3) Coding and Unit Testing; (4) Integration Testing; and (5) CLEC Test Environment Testing. This schedule has been developed to optimize the amount of business functionality that can be implemented within targeted time frames and quality levels. Experience has demonstrated that attempting to shorten or abbreviate this time line jeopardizes software quality and causes unproductive re-work for Verizon and the CLECs. As Verizon witness Ms. Gilligan testified: "There's actually quite a bit that goes into our product development process. We have to spec out the service, we have to do a technical description, we have to try and determine what systems work is involved, and then the systems work [is] scheduled and deployed." *Id.*

One of the switch features that ATX requested is "assume dial-9," which allows a caller to place a call to a location that is not within the Centrex system without first dialing "9" to reach an outside line. ATX had made the identical request in Pennsylvania in December 2000 and that request was the first Verizon had received for this feature as part of UNE switching service. As Verizon explained in its Section 271 application for Pennsylvania, this feature is not compatible with the Advanced Intelligent Network technology Verizon uses to support unbundled local switching for CLECs and the switch manufacturer indicated it would not be able to resolve this incompatibility for several years. *See* Verizon Section 271 Application for Pennsylvania, Lacouture/Ruesterholz Declaration, ¶ 267. It is also incompatible with the Advanced Intelligent Network technology Verizon uses in New Jersey. Nonetheless, Verizon pursued an alternative solution using existing Line Class Code technology in place of Advanced Intelligent Network technology. Although this alternative solution required significant changes to Verizon's current ordering, provisioning and billing systems, Verizon indicated in its Pennsylvania application that it expected to make the "assume dial-9" capability available to CLECs by the end of last year. Verizon met that expectation when it made "assume dial-9 capability" available to CLECs in Pennsylvania and New Jersey in October of last year.

Another service ATX requested in conjunction with network element platforms was analog PBX trunk service. Verizon first became aware of ATX's interest in analog PBX trunk service in early 2001 as part of the intercompany discussions about ATX's plan to convert its customers from resale to UNE-P in Pennsylvania. It is not surprising that there was very little CLEC interest in analog PBX trunks because they are used only for older generation PBX equipment, they are in decline in the marketplace and they represent only about 2 percent of Verizon's retail base. In fact, digital PBXs have been in the market for at least 10 or 12 years, and they were what the CLECs were requesting in connection with UNE switching and UNE-P. Therefore,

Verizon's product development efforts were focused on digital PBX trunk service and the more advanced alternatives of using Direct Inward Dialing ("DID") trunks with Primary Rate ISDN ("PRI") and DS-1 trunks configured for DID/DOD/PBX. Nonetheless, Verizon committed to the necessary product development activity and changes to Verizon's current ordering, provisioning and billing systems to support this older generation technology. Verizon completed this work and made analog PBX trunks available in conjunction with network element platforms on December 17, 2001.

The remaining switch feature ATX requested in conjunction with network element platforms was Remote Call Forwarding. Again, Verizon became aware of ATX's request in early 2001 and committed to the necessary product development activity and changes to Verizon's current ordering, provisioning and billing systems to support this switch feature. Verizon completed this work and made Remote Call Forwarding available in conjunction with network element platforms on December 17, 2001.

Dark Fiber. In its reply comments (at 9-10), Cablevision claims that the dark fiber language Verizon proposed during its arbitration with Cablevision violated the requirements of the New Jersey Board's December 17, 2001 order. Cablevision is mischaracterizing what occurred during the negotiations and the arbitration. Cablevision did not express any interest in obtaining dark fiber under the terms and conditions adopted by the New Jersey Board. Instead, Cablevision proposed that Verizon provide dark fiber to Cablevision in New Jersey under the terms and conditions of Verizon's dark fiber tariff in New York. *See* Cablevision Reply Comments, Attachment 2, Section 11.2.3 ("Verizon shall provide [Cablevision] with access to a Dark Fiber Loop (as such term is hereinafter defined) and to a Dark Fiber IOF (as such term is hereinafter defined) in accordance with, and subject to, the terms and conditions set forth in Verizon's New York Tariff No. 10, as amended from time to time"). The arbitrator adopted Cablevision's proposed language on dark fiber and ordered the parties to prepare, execute and file within four days an interconnection agreement incorporating Cablevision's proposed dark fiber language, which the arbitrator had adopted. At no time did Cablevision modify its proposed dark fiber language to incorporate the New Jersey Board's December 17 order. Nor did Cablevision request that the parties negotiate changes to the dark fiber provisions of their interconnection agreement to incorporate the New Jersey Board's December 17 order.

Moreover, the dark fiber language Verizon proposed to Cablevision was not only consistent with Verizon's current dark fiber obligations, but also designed to accommodate future changes in Verizon's dark fiber obligations. For example, Verizon's proposed dark fiber language says that "[n]otwithstanding anything else set forth in this Agreement, Verizon shall provide [Cablevision] with access to Dark Fiber Loops and Dark Fiber IOF in accordance with, but only to the extent required by, Applicable Law." In addition, Verizon's proposed terms and conditions apply to Verizon's dark fiber offerings "[e]xcept as otherwise required by Applicable Law." *See* Cablevision Reply Comments, Attachment 2, Section 11.2.3. Verizon's proposed contract language would thus automatically conform Verizon's dark fiber obligations to changes in applicable law. *Id.*

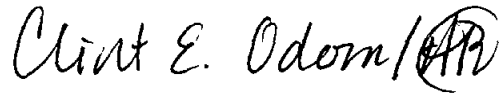
Verizon considers the dark fiber requirements contained in the New Jersey Board's December 17 order to be binding and accepts the dark fiber conditions set forth on pages 11 and 12 of that order. Specifically, the December 17 order requires Verizon to modify the definition of dark

fiber, permit intermediate routing of dark fiber, provide CLECs and the New Jersey Board staff specific details after rejection of a CLEC dark fiber request and to modify its ordering procedures consistent with the December 17 order.

Access New Jersey. Although XO claims (at 24) that it "joins the New Jersey Ratepayer Advocate" in recommending that, prior to Verizon receiving section 271 approval, a state universal service fund replace the Access New Jersey program, the Ratepayer Advocate did not raise this claim in its comments here and did not call for the elimination of Access New Jersey in its comments before the New Jersey Board. Moreover, contrary to the impression left by XO in its comments (at 24-25), the Access New Jersey program is not a universal service fund, nor is it discriminatory in any way. First, Access New Jersey is not a universal service fund at all; it is a state-mandated acceleration of Verizon's network modernization program and is intended, in particular, to benefit schools and libraries. Under the Access New Jersey program, Verizon has been required by the New Jersey Board, at Verizon's expense, to deploy a $55 million statewide high-speed (ATM) network for voice, video, and data, and to create a $25 million equipment fund to provide schools and libraries with the equipment necessary to connect to that high-speed network. Verizon has also been required to offer schools and libraries special rates for access to that network. Second, the Access New Jersey program is not at all discriminatory. As XO recognizes (at 25), CLECs are able to resell Verizon's discounted service to schools and libraries at the state-prescribed wholesale discount under sections 251(c)(4) and 252(d)(3). Nor are facilities based carriers prohibited from making similar network investments and providing schools and libraries with similar discounts. In any event, even if there were merit to XO's claims, which there is not, the New Jersey Board has a proceeding underway to address the future of the Access New Jersey program — which was designed to expire at the end of 2001, but which is being continued in effect pending the resolution of the current proceeding — and those claims are properly raised there.

Please let me know if you have any questions. The twenty-page limit does not apply as set forth in DA 01-2746.

Sincerely,



Clint E. Odom

Attachments

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verizon

September 19, 2001

Vice President, Regulatory & External Affairs
Nextlink New York LLC
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Bellevue, WA 98004

Dear Customer:

Since the tragic events of September 11, 2001, Verizon has made every effort to keep you apprised of our disaster recovery efforts in New York City and other affected areas. We have done this primarily through regular conference calls and postings to Verizon's wholesale website. By all accounts, the CLEC community has been enormously supportive of our on-going efforts and has demonstrated a clear understanding of the enormity of the task before us all. Thank you.

Verizon's interconnection agreements and tariffs may require that Verizon provide you with written notification of any *force majeure* event that might affect Verizon's ability to perform its obligations under those interconnection agreements and tariffs. While we believe that the required notice has been provided already through the conference calls and web site information that Verizon has shared with you, for the avoidance of doubt, this letter is intended to provide formal notice that Verizon's performance under its interconnection agreements and tariffs will be adversely affected by the events of September 11th. By way of example, pre-ordering, ordering, and provisioning intervals, and accordingly, any relevant performance remedies, in the states of New York, Connecticut, New Jersey, Maryland, and Virginia, and in Washington, D.C., are among the obligations that will be affected. The duration of the current emergency is still unclear, but we will continue to keep you apprised of our progress through the established calls, web site postings, and direct account manager contacts.

We greatly appreciate your continued support and understanding.

Very truly yours,

Jeffrey A. Masoner
Vice President Interconnection Services

*** TOTAL PAGE.02 ***

***Section 18. Survival***

18.1 Any liabilities or obligations of a Party for acts or omissions occurring prior to the expiration, cancellation or termination of this Agreement, any obligation of a Party under any provision for indemnification or defense (including, but not limited to, any of Sections 10, 11, 12, 23, 24, 28 and 29), Section 3, "Termination", Section 22, "Confidential Information", any provision for limitation of liability, and any obligation of a Party under any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) expiration, cancellation or termination of this Agreement, shall survive the expiration, cancellation or termination of the Agreement, but solely to the minimum extent necessary to effectuate such provisions or complete such performance.

***Section 19. Force Majeure***

19.1 Except as otherwise specifically provided in this Agreement (including, by way of illustration, circumstances where a Party is required to implement disaster recovery plans to avoid delays or failure in performance and the implementation of such plans was designed to avoid the delay or failure in performance), neither Party shall be liable for any delay or failure in performance of any part of this Agreement by it caused by acts or failures to act of the United States of America or any state, district, territory, political subdivision, or other governmental entity, acts of God or a public enemy, strikes, labor slowdowns, or other labor disputes, but only to the extent that such strikes, labor slowdowns, or other labor disputes also affect the performing Party, fires, explosions, floods, embargoes, earthquakes, volcanic actions, unusually severe weather conditions, wars, civil disturbances, or other causes beyond the reasonable control of the Party claiming excusable delay or other failure to perform ("Force Majeure Condition"). In the event of any such excused delay in the performance of a Party's obligation(s) under this Agreement, the due date for the performance of the original obligation(s) shall be extended by a term equal to the time lost by reason of the delay. In the event of such delay, the delaying Party shall perform its obligations at a performance level no less than that which it uses for its own operations. In the event of such performance delay or failure by Bell Atlantic, Bell Atlantic agrees to resume performance at Parity and in a Non-Discriminatory manner.

19.2 If any Force Majeure Condition occurs, the Party whose performance fails or is delayed because of such Force Majeure Condition shall give prompt notice to the other Party, and upon cessation of such Force Majeure Condition, shall give like notice and commence performance hereunder as promptly as reasonably practicable.

19.3 Notwithstanding Section 19.1, no delay or other failure by a Party to perform shall be excused pursuant to this Section by the delay or failure of a Party's subcontractors, materialmen, or suppliers to provide products or services to the Party, unless such delay